85-868

No. _____

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT ALLEN HURWITZ,

Petitioner

- vs. -

THE STATE OF TEXAS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

MALONEY, GOTCHER & YEAGER, PC
505 West 12th Street, #200
Austin, Texas 78701
512/476-8700

BY DAVID L. BOTSFORD
State Bar #02687950

Whether Petitioner's waiver of Fifth and Fourteenth Amendment rights not to plead guilty and to a trial by jury were rendered involuntary and unintelligent by virtue of a statutory scheme which had previously been declared unconstitutional by a Texas intermediate appellate court (and which judicial decision was pending review by the Texas Court of Criminal Appeals) when the State and the trial court forced Petitioner to stand trial under that unconstitutional statutory scheme despite being informed by Petitioner of the uncertainty regarding the statutory scheme?

TABLE OF CONTENTS

PAGE

OPINION BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

1. FACTS RELEVANT TO QUESTION PRESENTED..... 2

2. DISPOSITION BY STATE COURTS..... 6

REASON FOR GRANTING THE WRIT..... 7

CONCLUSION..... 10

TABLE OF CASES

PAGE

Blackledge v. Perry, 417 U.S. 21,
94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)..... 7

Brady v. United States, 397 U.S. 742,
90 S.Ct. 1463, 24 L.Ed.2d 742 (1970)..... 7

Crisp v. State, 643 S.W.2d 487
(Tex. App. – Austin 1982)..... 3

Ex parte Crisp, 661 S.W. 2d 944
(Tex. Cr. App. 1983)..... 4

Hurwitz v. State, 673 S.W.2d 347
(Tex. Cr. App. 1984)..... 1

North Carolina v. Pierce, 395 U.S. 711,
89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)..... 7

United States v. Jackson, 390 U.S. 570,
88 S.Ct. 1209, 20 L.Ed. 138 (1968)..... 7

OPINION BELOW

On November 23, 1983, Petitioner's conviction was reversed in an unpublished, per curiam opinion by the Court on Appeals, Third Supreme Judicial District of Texas. The basis of the reversal is not pertinent to this petition.

The State of Texas timely filed a motion for rehearing and on rehearing, the Court of Appeals withdrew its previous opinion and affirmed Petitioner's conviction in a published per curiam opinion. *See Hurwitz v. State*, 673 S.W.2d 347 (Tex. Cr. App. 1984).

Petitioner timely sought discretionary review to the Court of Criminal Appeals of Texas. On October 31, 1984, the Court of Criminal Appeals granted Petitioner's request for discretionary review. Thereafter, on April 10, 1985, the Court of Criminal Appeals of Texas affirmed the lower court's opinion. That opinion and the concurring opinions are attached hereto in Appendix A.

Petitioner timely filed a motion for rehearing which was denied without written opinion on July 3, 1985. *See* Appendix B.

Petitioner thereafter timely filed a second motion for rehearing which was denied without written opinion on September 25, 1985. *See* Appendix C.

JURISDICTION

Pursuant to Rules 20.1, 20.4 and 29, this Petition is due to be filed on or before November 25, 1985. This Court has jurisdiction to review the judgment of the Court of Criminal Appeals under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V: "No person shall be . . . . deprived of life, liberty, or property, without due process of law . . . ."

AMENDMENT XIV: ". . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . ."

STATEMENT OF THE CASE

1. FACTS RELEVANT TO QUESTION PRESENTED

Prior to September 1, 1981, possession of marihuana was rendered illegal and the applicable punishment was prescribed by Vernon's Ann. Civ. St., Article 4476-15, Section 4.05, which stated, in pertinent part, that:

> "(a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.
>
> (b) An offense under Subsection (a) of this section is:
>
> (1) a felony of the third degree if he possesses more than four ounces;"

Effective September 1, 1981, possession of marihuana was rendered illegal and the applicable punishment was prescribed by Vernon's Ann. Civ. St., Article 4476-15, Section 4.051, which stated, in pertinent part, that:

> "(a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.
>
> (b) An offense under Subsection (a) of this section is:
>
> * * *
>
> (3) a felony of the third degree if the amount of marihuana possessed is five pounds or less but more than four ounces; and
>
> (4) a felony of the second degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds.
>
> (c) A person commits an aggravated offense if the person commits an offense under Subsection (a) of this Act and the amount of marihuana possessed is more than 50 pounds.

(d) An offense under Subsection (c) of this section is:

> (1) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is 200 pounds or less but more than 50 pounds."

Section 4.051 was enacted pursuant to House Bill 730. *See* Acts 67th Leg., Reg. Sess., 1981, Ch. 268, Pg. 696-708, Eff. Sept. 1, 1981.

On November 24, 1982, a Texas intermediate appellate court (Court of Appeals, Third Supreme Judicial District, Austin) declared Article 4476-15, Section 4.051 unconstitutional due to State constitutional deficiencies regarding the caption of the house bill which enacted it. *See Crisp v. State*, 643 S.W.2d 487 (Tex. App. - Austin 1982). Under this case, new Section 4.051 was null and void and old Section 4.05 continued in effect.

That same day, November 24, 1982, Petitioner was indicted in a two count indictment. Count I charged Petitioner with possession of "more than fifty but less than two hundred pounds" of marihuana and Count II charged Petitioner with possession of "more than five pounds and less than fifty pounds" of marihuana. Both counts relied on the same alleged date of possession, September 8, 1982, and related to the same alleged act of possession. Both counts of the indictment alleged offenses under Section 4.051. Count I alleged an aggravated offense under Section 4.051(c) which was punishable under Section 4.051(d)(1). Count II alleged a second degree felony under Section 4.051(b)(4) and was punishable under V.T.C.A., Penal Code, Section 12.33.

Texas law, at all times relevant hereto, provided the following penalty ranges for second and third degree felonies:

V.T.C.A., Penal Code, Section 12.33 stated:

> "(a) An individual adjudged guilty of a felony of the second degree shall be punished by confinement in the Texas Department of Corrections for any term of not more than 20 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000."

V.T.C.A., Penal Code, Section 12.34, stated:

"(a) An individual adjudged guilty of a felony of the third degree shall be punished by confinement in the Texas Department of Corrections for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $5,000."

Thus, under the old statute - Section 4.05 - Petitioner would have been facing a third degree felony having a maximum punishment range of two to ten years and a fine not to exceed $5,000. On the other hand, under the new statute - Section 4.051 - Petitioner was facing an aggravated offense on Count I having a maximum punishment range of five to ninety-nine years or life and a fine not to exceed $50,000 *or* a second degree felony having a maximum punishment range of two to twenty years and a fine not to exceed $10,000.

Due to the uncertainty occasioned by the opinion in *Crisp v. State, supra*, Petitioner filed a pretrial motion to quash the indictment.

On January 12, 1983, the Court of Criminal Appeals of Texas granted the State's petition for discretionary review, pursuant to Article 44.45(b)(1), Vernon's Ann. C.C.P., and thereby agreed to review the decision of the Court of Appeals in *Crisp v. State, supra*, regarding the constitutionality of Section 4.051. *See Ex parte Crisp*, 661 S.W.2d 944 at 945-946 (Tex. Cr. App. 1983).

On January 25, 1983, a pretrial hearing was held in this case in the trial court. At that time, Petitioner's counsel urged his motion to quash and brought to the attention of the trial court the fact that the Court of Criminal Appeals had granted review in *Crisp v. State, supra*. There was an extensive colloquy regarding the obviously unsettled state of the law. The State took the position that Section 4.051 applied until the Court of Criminal Appeals ruled otherwise and thus, Petitioner was facing either an

aggravated offense or a second degree felony. Petitioner's counsel repeatedly voiced his dilemma to the Court as to his inability to intelligently advise his client in light of the unsettled nature of the law. Petitioner's counsel was concerned over his inability to intelligently advise Petitioner whether: (1) to plead guilty and accept a proffered plea bargain (of either two years confinement or ten years probation and a $5,000 fine) or whether he should contest his innocence; (2) Petitioner was facing a third degree, second degree or aggravated offense and the ramification on voir dire, trial strategy, and bond pending appeal dependent on what he was facing (bond not being available on sentences where more than 15 years is assessed, Article 44.04(b), Vernon's Ann. C.C.P.). Nevertheless, the trial court overruled Petitioner's motion to quash and the case proceeded under Section 4.051.

On January 31, 1983, the case was scheduled for jury selection and jury trial. Due to the State's insistence that the case involved a punishment range in excess of that allowed under the old statute (i.e., in excess of 2 to 10 and a fine not to exceed $5,000), Petitioner's counsel advised Petitioner to waive his Fifth and Fourteenth Amendment rights to not plead guilty and to not incriminate himself and his state constitutional and statutory rights to trial by jury. Petitioner followed his counsel's advice and accepted a plea bargain of two years confinement, with the right to appeal the points, *inter alia*, raised in the motion to quash.

The case then proceeded on Count II of the indictment and the trial court admonished Petitioner on a range of punishment of two years to twenty years and a fine not to exceed $10,000. Petitioner pleaded guilty and was assessed two years confinement in the Texas Department of Corrections. Thereafter, Petitioner perfected his appeal to the Court of Appeals.

On September 14, 1983, the Court of Criminal Appeals delivered its opinion in *Ex parte Crisp*, 661 S.W. 2d 944 (Tex. Cr. App. 1983). There, the Court of Criminal Appeals affirmed the opinion of the Court of Appeals in *Crisp v. State, supra*, and held that Section 4.051 was void and that the former law - Section 4.05 - continued in effect.

2. DISPOSITION BY STATE COURTS

On appeal to the Court of Appeals, Petitioner asserted that the trial court erred by requiring Petitioner to be tried under an unconstitutional statute. In his brief to the Court of Appeals, Petitioner asserted that although the sentence he received was within the penalty range provided for a third degree felony (i.e., the range allowed under the prior law - Section 4.05), it was manifestly unfair to threaten him with up to 20 years (i.e., a second degree felony under Section 4.051), and that the action of the trial court in so threatening Petitioner had a coercive effect and rendered his plea of guilty and waiver of rights involuntary. The Court of Appeals summarily rejected Petitioner's contention in its second opinion. *See* 673 S.W.2d 347 (Tex. Cr. App. 1984). Although the Court of Appeals agreed that the trial court improperly admonished Petitioner on a second degree felony when it should have admonished Petitioner as to a third degree felony, the admonishment substantially complied with Article 26.13, Vernon's Ann. C.C.P. and that, as such, Petitioner would not have been misled or harmed by the Court's admonishment. In other words, the Court rejected Petitioner's assertion that the plea was involuntary and unintelligent without any discussion of that precise contention.

Accordingly, Petitioner sought discretionary review to the Court of Criminal Appeals and alleged that his plea was involuntary. The Court of Criminal Appeals addressed Petitioner's contention from the perspective that it was the admonishment as to an incorrect punishment range which allegedly rendered his plea unintelligent and involuntary. With respect to Petitioner's contention, the Court held that the admonishment, although admittedly incorrect, did not render the plea unintelligent or involuntary.

Petitioner attempted to point out, in his second motion for rehearing, that it was the unsettled state of the law, the ramifications thereof, the insistence of the State and the trial court that the case involved a range of punishment in excess of two to ten, and the potential ramifications relating thereto that, when considered together, coerced Petitioner's acceptance of the plea bargain, waiver of right and the entry of the plea. Petitioner pointed out to the Court that the trial court's admonishment of

Petitioner on two to twenty as opposed to two to ten was merely a continuation of the coercive effect generated by the State's insistence that the case involved a punishment range in excess of two to ten. The State's insistence, of course, was in apparent degradation of the opinion of the Court of Appeals in *Crisp v. State, supra*. Otherwise, if there was no coercion intended, the trial court would have and could have admonished Petitioner on two to ten, particularly in light of the plea bargain. However, the trial court well knew that if it admonished Petitioner on two to ten, petitioner would not plead guilty, but would insist on a jury trial. Then, of course, the trial court would have been forced to allow Petitioner to proceed with the jury trial on a punishment range of two to ten, for an increase above two to ten would have facially constituted vindictiveness under *North Carolina v. Pierce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) and their progeny.

Notwithstanding the above assertions and the fact that Petitioner pointed out that the instant case was similar to *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 24 L.Ed.2d 747 (1970), the Court of Criminal Appeals refused to consider the second motion for rehearing.

REASONS FOR GRANTING THE WRIT

1. The Opinion Of The Court Of Criminal Appeals Conflicts With This Court's Opinion In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 24 L.Ed.2d 747 (1970) And *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

In *Brady v. United States, supra*, Brady was charged in 1959 with kidnapping under 18 U.S.C. §1201(a). Under the statute, as it then existed, Brady *could* receive the death penalty if he proceeded to a jury trial, but *could not* receive the death penalty if he pleaded guilty. Brady pleaded guilty *after* he learned that his co-defendant had confessed and would be available to testify against him.

In 1967, Brady filed a federal habeas corpus action alleging, *inter alia*, that his plea was not voluntarily given because 18 U.S.C.

§1201(a) operated to coerce his plea. After a hearing, the federal district court held, *inter alia*, that Brady had decided to plead guilty when he had learned that his co-defendant was going to plead guilty and would be available to testify against him. 397 U.S. 745. The federal district court also held that Brady pleaded guilty "by reason of other matters and not by reason of the statute" or because of any action of the trial judge. *Id.* Accordingly, the plea was voluntarily entered according to the district court. *Id.*

Brady appealed to the Tenth Circuit which approved the district court's holding that the plea was voluntarily entered. *Id.* Brady then sought certiorari from this Court. *Id.*

This Court granted certiorari to resolve the issue of whether the Court of Appeals had erred in light of this Court's decision in *United States v. Jackson, supra. Jackson,* it must be remembered, had ruled that 18 U.S.C. §1201(a) was valid except for the death penalty provision. With regard to the death penalty provision, this Court held that it imposed an impermissible burden upon the exercise of a constitutional right. It had the inevitable effect of discouraging the assertion of the Fifth Amendment right not to plead guilty and deterred the exercise of the Sixth Amendment right to demand a jury trial. Accordingly, the Court held that the availability of the death penalty could not constitutionally be extended only to those defendants who asserted their right to a jury trial. 390 U.S. at 583.

In *Brady, supra*, this Court rejected the notion that Brady's plea of guilty was not *voluntarily and intelligently* entered. However, central to that determination was the fact that Brady had decided to plead guilty only after learning of the status of his co-defendant. Furthermore, and of particular interest, was the fact that Brady's attorney had no indication that 18 U.S.C. §1201(a) was unconstitutional when Brady had pleaded guilty.

In the instant situation, all parties concerned knew of the unsettled state of the law. It was the unsettled state of the law which initiated the entire situation herein. In this regard, this Court stated in *Brady*, supra at 757 that

> ". . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because *later judicial decisions* indicated that

> the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to *the then existing law as to possible penalties but later pronouncements of the courts*, as in this case, hold that the maximum penalty for the crime in question was less than was *reasonably assumed* at the time the plea was entered.
>
> The fact that *Brady did not anticipate United States v. Jackson, supra*, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged *simply because it later develops* that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable *has been held inapplicable in subsequent judicial decisions.*" (emphasis added)

In the present case, Petitioner clearly wanted to try what he believed was a third degree felony. *Cf.* R. I-6 [January 18, 1983, election to have jury assess punishment in event jury found Petitioner guilty]. Petitioner voiced his objections to the statutory scheme (which was undergoing judicial debate as to its constitutionality) due to the State's insistence that the case involve a range of punishment in excess of what the previous statute mandated. Petitioner ultimately accepted a plea bargain offer rather than face a jury qualified on a range of punishment far in excess of that which his counsel believed to be the only permissible range and face the further possibility of incarceration without bail, *cf.* Article 44.04(b)., *supra*, pending the appeal of his points preserved prior to the trial. The admonishment to Petitioner by the trial court continued to perpetrate the coercive effect of the unconstitutional statute itself and the State's insistence that it authorized a range of punishment in excess of two to ten.

Thus, unlike *Brady*, the decision to plead guilty was not voluntarily and intelligently made because the status of the law was completely unsettled and Petitioner knew the law was

unsettled. In other words, how could Petitioner make a voluntary, intelligent choice when he did not know what the law actually provided for in the way of a range of punishment? Petitioner, in essence, was placed on the horns of a legal dilemma: knowing that the Court of Appeals for the Third Supreme Judicial District had declared the statutory scheme unconstitutional and that the Court of Criminal Appeals had granted discretionary review should he continue to insist on a jury trial when the State and the Court continued to insist on trying the case on a range of punishment far in excess of that which his counsel believed to be authorized, or should he yield to that coercion and attempt to minimize his exposure by waiving valuable state and federal constitutional rights? In essence, the State's insistence that the range of punishment exceed two to ten (and the potential ramifications thereof) chilled Petitioner's state and federal constitutional rights to a jury trial and to plead not guilty. This was the harm and coercion that was aggravated by the actual admonishment of two to twenty by the trial court. *See and compare United States v. Jackson, supra* at 390 U.S. 581-583 [Defendant's plea coerced by unconstitutional statute].

In light of the foregoing, it appears that the instant case is in conflict with *Brady, supra*, and *Jackson, supra*. Given the countless number of opinions emanating out of the Texas appellate courts in wake of *Ex parte Crisp, supra*, certiorari would be appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MALONEY, GOTCHER & YEAGER, PC
505 West 12th Street, #200
Austin, Texas 78701
512/476-8700

By _____
DAVID L. BOTSFORD
State Bar #02687950
Counsel of Record

APPENDIX A

ROBERT ALLEN HURWITZ, Appellant

NO. 742-84 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas [WILLIAMSON County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted of the offense of possession of marihuana pursuant to V.A.C.S.A., §4.051(b)(4), and punishment was assessed by the court at two years confinement in the Texas Department of Corrections.

We granted review in this case to examine the court of appeals handling of appellant's contention that his plea of guilty was not voluntary. Specifically, appellant contended that since his indictment was for a crime contained in an unconstitutional statute, the trial judge's admonishment as to the range of punishment was improper, rendering his guilty plea involuntary.

The appellant was indicted in a two count indictment charging him in Count I with possessing more than fifty pounds of marihuana prohibited by §4.051(d)(1), V.A.C.S.A., and in Count II with possessing more than five pounds and less than fifty pounds of marihuana prohibited by §4.051(b)(4), V.A.C.S.A.

In Ex parte Crisp, 661 S.W.2d 944, *aff'd. on rehearing*, 661 S.W.2d 956 (Tex.Cr.App. 1983), this Court held that House Bill 730, 1981 Tex. Gen. Laws, Ch. 268, which added §4.051 to the Act, was unconstitutional. We also held that the Controlled Substances Act stood as if House Bill 730 had never been enacted.

Appellant pled guilty to Count II of the indictment. Count II was, under H.B. 730, a second degree felony and appellant was appropriately admonished of the penalty range by the trial judge. The effect of our decision in *Crisp*, supra, was that Count II was in reality a third degree felony. Thus, the trial judge told the appellant that the maximum sentence he could receive was twenty years when it was actually ten years.

In affirming appellant's conviction, the court of appeals relied

on Taylor v. State, 610 S.W.2d 471 (Tex.Cr.App. 1980). Appellant now relies heavily on Ex parte Smith, 678 S.W.2d 78 (Tex.Cr. App. 1984), which cites *Taylor* with approval. At first glance, this case seems to be identical to *Smith*. In *Smith*, this Court held that:

> "It was established there was an improper admonishment as to penalty, and . . . there was a plea bargain, a plea bargain based upon the wrong range of punishment. *Appellant alleged under oath he would not have entered the plea bargain if he had known the maximum penalty was only one-half of what he was told.*
>
> * * * *
>
> "*We conclude that applicant was not aware of the consequences of his plea,* that he was harmed by the court's admonishment, and further, under all the circumstances, the guilty plea was not knowingly and voluntarily entered." (Emphasis added.)

Like *Smith*, supra, appellant contends that his plea of guilty, pursuant to a plea bargain agreement, was coerced because he was erroneously admonished as to the maximum punishment available to be assessed. As correctly pointed out by the court of appeals, however, there are some circumstances in the case at bar which distinguish it from *Smith*, supra.

Appellant filed a pre-trial motion to quash the indictment which was based solely upon the Third Court of Appeals opinion in Crisp v. State, 643 S.W.2d 487 (Tex.App. — Austin 1982). The hearing on this motion occurred *after* this Court had granted the State's petition for discretionary review in *Crisp*. The record reflects extensive discussion between the Court, the State, and defense counsel concerning the unsettled state of the law until this Court rendered its decision in *Crisp*. As the court of appeals pointed out in its decision, it was apparent to everyone that appellant was charged with either a third-degree felony or, alternatively, aggravated possession (Count I), and a second-degree felony (Count II), depending on this Court's holding in *Crisp*.

Appellant very clearly had this knowledge when he entered into his plea bargain agreement with the State. The plea bargain

agreement reads in pertinent part:

> "The defendant agrees to plead guilty to the offense alleged in Count II of the indictment. The State elects to waive Count I of the indictment and proceed on Count II in return for said plea. The State recommends confinement in the Texas Department of Corrections for two (2) years."

Essentially what the State did was waive the aggravated portion of the indictment and recommend a punishment which would be the minimum whether the offense were a second or third-degree felony, in return for appellant's plea of guilty.

Given this set of facts, we must agree with the holding in the court of appeals that:

> "While we may conclude that appellant's decision as to his plea to be entered may have been rendered more burdensome by the *unsettled state of the law*, we cannot conclude that he was misled or harmed by the court's *admonishment*, which the record reflects he *knew* might or might not be correct. It is equally clear, as to his knowledge of the consequences of his plea, that he was aware that he had bargained for the minimum punishment available, regardless of the uncertainty as to whether the offense was a second- or third-degree felony." (Emphasis original.)

The reasoning the court of appeals followed in affirming appellant's conviction is sound, and we approve it. The judgment of the court of appeals is affirmed.

MILLER, Judge

(Delivered: April 10, 1985)
EN BANC
PUBLISH

ROBERT ALLEN HURWITZ, Appellant

NO. 742-84 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas [WILLIAMSON County]

CONCURRING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

The "primary focus of the analysis [of the court below] is on substantial compliance" with Article 26.13, V.A.C.C.P. Hurwitz v. State, 673 S.W.2d 347, 351 (Tex.App. — Austin 1984). That analysis flows from its premise that the part of his admonishment as to range of punishment given by the judge of the trial court is "erroneous," *id.*, at 350. In my view, however, what is erroneous is that premise.

A few days before the guilty plea hearing the trial court had overruled a motion to quash the indictment founded on the holding in Crisp v. State, 643 S.W.2d 487 (Tex.App. — Austin 1982), affirmed, Ex parte Crisp, 661 S.W.2d 944, 661 S.W.2d 956 (Tex.Cr.App. 1983). On the day the trial judge admonished appellant the range of punishment provided by statute for the second degree felony with which he was then charged was a term not more than ten years nor less than two years and a fine not to exceed $10,000. That is precisely what the trial judge informed appellant.

An admonishment comporting with the law then in effect simply is not "erroneous." That there is extant — but not final — an opinion of an appellate court holding invalid the legislative act from which that particular offense is derived would not authorize or require a judge, who has earlier overruled an attack against the statute, to state a range of punishment other than that provided therein by the Legislature. See Komurke v. State, 562 S.W.2d 230, 235 (Tex.Cr.App. 1978).

To find an admonishment as to range of punishment wanting because the statutory amendment underlying the prosecution was later found unconstitutional is, of course, to indulge in sheer

fiction. Rather than continuing to engage in that kind of fiction, the Court should test propriety of accepting a plea of guilty or nolo contendere under Article 26.13, V.A.C.C.P, in light of the existing substantive statutory prescription of the offense charged — then and there presumptively valid, after all — as well as the admonishment that is given and other conditions accompanying entry of the plea.

Acceptance of the plea of guilty passes muster in those circumstances in this cause. The admonishment was correct and proper when given. In the absence of evidence showing otherwise it follows that the guilty plea was made freely and voluntarily. Thus, "substantial compliance" is not in the case.

The plea bargain appears to be regular, and there is nothing in this record to suggest that in the face of a mountain of evidence to support a finding of guilt, appellant entered his plea for any other reason than to perfect an appeal on the merits of his motion to suppress that evidence. The judgment and sentence in this cause describe the offense as "possession of marihuana" — without stating a classification as to degree of felony. The punishment is two years confinement in the Texas Department of Corrections.

On those bases the judgment of the court of appeals should be affirmed.[1]

But for the fact that H.B. 730 was subsequently found unconstitutional there would be no question about what the prosecution and accused agreed to do and did and what the trial

---

[1] Indeed, appellant has not sought review on a theory that when given the admonishment was erroneous *per se*. His ground for review is: "The trial of petitioner pursuant to his indictment under an unconstitutional statute rendered his guilty plea involuntary." And as I understand his ground of error one in the court of appeals, it is stated substantially the same. *Hurwitz v. State*, supra, at 350. So far no one seems to have addressed the ground headon, opting instead to look at a contention made under it. Addressing the ground first, I find it is untenable for much the same reasons I would affirm the judgment of the court of appeals: that the statute was later found unconstitutional would not *ipso facto* render an otherwise free and voluntary plea "involuntary." However, other factors — such as assessment of punishment within a higher range than authorized by the revived law — might require reversal of the conviction. Compare Hernandez v. State, 669 S.W.2d 734 (Tex.Cr.App. 1984).

(There is a misstatement of historical fact in *Hernandez*. At page 735 it is said that "in *Crisp* we refused to set aside the convictions . . ." The basis for the habeas corpus proceeding in *Crisp* was that the statute underlying the prospective prosecution was unconstitutional; trial had not yet been held; there were no convictions to set aside. See *Crisp*, at 948.)

court ultimately did. Under each ground appellant acknowledges that the punishment assessed is within the range of a felony of the third degree. (Actually it is the absolute minimum.) Nevertheless, he contends that "under the circumstances, it was manifestly unfair to threaten him with a twenty-year exposure, and the action of the trial court in so doing had a coercive effect concerning the guilty plea entered." Reiterating that contention in his brief on the merits, appellant adds a citation to and quotes from Ex parte Smith, 678 S.W.2d 78 (Tex.Cr.App. 1984); it had not been decided by this Court before the opinion of the court below was delivered.

Similarly, the majority opinion examines *Smith*, and though the majority then proceeds to distinguish *Smith* from the circumstances of this cause, the perceived need to make that distinction lends credibility and weigh to its precedential value. *Smith*, like this cause was seen by the court of appeals, involved a "substantial compliance" determination. Without explaining its reason for finding that admonishment "improper," *Smith* merely states: "There can be no question that the admonition was not proper." 678 S.W.2d at 78. The Austin Court of Appeals found that since the effect of *Crisp* was to revive the Texas Controlled Substances Act (Act) as it existed prior to enactment of H.B. 730, appellant "was on trial for a third-degree felony," and therefore the admonishment as to range of punishment for a second degree felony actually given by the trial judge was "erroneous." Presumably, a similar but unstated rationale led to the same conclusion in *Smith*. Retroactively, then, an admonishment correctly made at the time becomes incorrect, and depending on other circumstances may undo the entire trial — *Smith* awards a new trial while appellant is denied one.

The plea hearing in *Smith* had been held on September 16, 1983; an appeal was not taken. The *Crisp* opinion of this Court on rehearing was not delivered until December 7, 1983. Under the rationale developed *ante*, I am now convinced that *in this narrow aspect Smith* is wrong. Since the trial judge correctly stated the range just as provided by the applicable statute then in effect, in my view the admonishment in *Smith* with respect to the range of punishment was not "improper."

For those reasons I join the judgment of the Court.

CLINTON, Judge

(Delivered April 10, 1985)
EN BANC
PUBLISH
W. C. Davis & McCormick, JJ., join

ROBERT ALLEN HURWITZ, Appellant

NO. 742-84 vs. THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas [WILLIAMSON County]

CONCURRING OPINION

I agree with the majority that the result that the court of appeals reached is correct, that appellant is not entitled to relief. Robert Allen Hurwitz, appellant, had asserted on appeal that his plea of guilty, made pursuant to a plea bargain agreement, was coerced because he was erroneously admonished by the trial judge as to the maximum possible punishment available. Because I find that the "The reasoning the court of appeals followed in affirming appellant's conviction is unsound," as is the reasoning the majority follows in this cause, I can only concur in the result the majority reaches in this cause.

What causes the majority's reasoning to be faulty lies in the fact that it is attempting to resolve the issue of whether appellant was properly admonished by the trial judge by applying some form of retrospectivity to what we now know to be the law to what was the law at the time the appellant entered his plea of guilty in this cause. However, in this instance, but as Judge Clinton correctly points out in the concurring opinion that he has filed in this cause, "The admonishment [that appellant received in this cause] was correct and proper when given. In the absence of evidence showing otherwise it follows that the guilty plea was made freely and voluntarily . . ." Judge Clinton, however, opines that the issue of "substantial compliance," see Art. 26.13, V.A.C.C.P., is not in the case. For reasons soon to be stated, I am unable to agree with Judge Clinton that the issue of "substantial compliance" is not in this cause. However, I do agree with Judge Clinton's implicit suggestion that *Ex parte Smith*, 678 S.W.2d 78 (Tex.Cr.App.1984), should be expressly overruled.

I believe that what appellant is actually trying to accomplish in this cause is to have this Court invoke and apply to this cause

in this cause is to have this Court invoke and apply to this cause the provisions of Art. 1, Section 16, *Texas Constitution*, which provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

In *Millican v. State*, 167 S.W.2d 188 (Tex.Cr.App.1943), this Court wrote: "An ex post facto law, in criminal matters, is defined by Justice Wheeler in the case of Holt v. State, 2 Tex. page 363, as follows: 'The prohibition as to ex post facto laws, Constitution Art. 1, Section 14, has been held to extend only to a law which makes an act done before its passage and which was innocent when done, criminal; or which aggravates a crime and makes it greater than when committed; or which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; or which alters the legal rules of evidence and receives less, or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. (Citations Omitted.)" (190).

In this instance, however, appellant was convicted and punished under what was then a presumptively valid law. However, in *Ex parte Crisp*, 661 S.W.2d 944, aff'd on rehearing, 661 S.W.2d 956 (Tex.Cr.App.1983), this Court affirmed the decision of the Austin Court of Appeals, see *Crisp v. State*, 643 S.W.2d 487 (Tex.App.-Austin1982), and declared that because of Art. III, Section 35 of the Texas Constitution, the Controlled Substances Act under which appellant was found guilty was unconstitutional. This Court also held that the Controlled Substances Act stood as if the new law had never been enacted.

Thus, appellant is not the victim of a law which changed the punishment for a crime after the crime had been committed, which would be an ex post facto law, nor is he the victim of a law that inflicted a greater punishment, which also would be an ex post facto law. To the contrary, but by what this Court held in *Ex parte Crisp*, supra, appellant's conviction stands as though he had been convicted under the former law, which considerably decreased the punishment that was provided by the law under which he was convicted.

In the case at bar, by virtue of this Court's decision in *Ex parte Crisp*, supra, the range of punishment for appellant's offense has been considerably decreased from what it was under the new

law. See and compare *Ex parte Scott*, 471 S.W.2d 54 (Tex.Cr.App.1971). In this instance, appellant received the minimum punishment that was provided under the former law, and there is no claim that had the former law been in effect when appellant pled guilty he would have received a different punishment. This Court's decision of *Ex parte Crisp*, supra, caused the trial court's admonition to be incorrect only as to the maximum possible punishment that could have been assessed. In *Taylor v. State*, 610 S.W.2d 471, 478 (Tex.Cr.App.1981), (Opinion on State's Motion for Rehearing), a majority of this Court held that in admonishing a defendant, if the trial judge states the correct minimum possible punishment, but incorrectly states the maximum possible punishment, but the defendant's punishment is assessed within the correct range of punishment, notwithstanding the error, there has been substantial compliance with the provisions of Art. 26.13, V.A.C.C.P. Thus, in this cause, the admonishment that appellant received from the trial judge was in substantial compliance with the law that was formerly in effect. The error in the trial court's admonition did not cause the appellant's plea to become involuntary, nor is he subject to any type ex post facto law.

The majority reaches the right result. I concur.

TEAGUE, Judge

EN BANC
DELIVERED: 4-10-85

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0742-84
STYLE: Hurwitz, Robert Allen

July 3, 1985

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

APPENDIX C

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0742-84
STYLE: Hurwitz, Robert Allen

September 25, 1985

On this day the Appellant's Second Motion for Rehearing was denied.

Thomas Lowe, Clerk